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No. 85-970

In the Supreme Court of the United States

OCTOBER TERM, 1985

MARK A. THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was denied due process of law when a Court of Military Review established under Article 66(a) of the Uniform Code of Military Justice, 10 U.S.C. (Supp. II) 866(a), summarily affirmed petitioner's general court-martial conviction without writing an opinion setting forth its reasons for rejecting petitioner's claims of error.

2. Whether the United States Court of Military Appeals abused its discretion when it granted petitioner's petition for review only with respect to an issue specified by the court, and, after receiving briefs from both parties, affirmed the decision of the Court of Military Review without discussing the issues presented by petitioner.

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OPINIONS BELOW

The order of the United States Court of Military Appeals (Pet. App. 1a-7a) is reported at 21 M.J. 94. The decision of the United States Navy-Marine Corps Court of Military Review (Pet. App. 9a-11a) is unreported.

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on September 26, 1985. The petition for a writ of certiorari was filed on November 25, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. I) 1259(3).

STATEMENT

Petitioner, a member of the United States Marine Corps, was convicted by a general court-martial convened by the Commanding General, Second Marine Division, Fleet

Marine Force, Camp Lejeune, North Carolina, of three specifications of conspiracy to commit robbery, one specification of carrying a privately-owned firearm contrary to a general order, one specification of assault with intent to commit robbery, and one specification of carrying a concealed weapon, in violation of Articles 81, 92, 122, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 881, 892, 922, and 934. He was sentenced to a dishonorable discharge, confinement at hard labor for seven years, and forfeiture of all pay and allowances. A substitute convening authority reviewed the case pursuant to Article 60, UCMJ, 10 U.S.C. (Supp. II) 860, and disapproved the findings of guilty on the charge of carrying a concealed weapon but otherwise approved the findings and sentence.[1] The United States Navy-Marine Corps Court of Military Review affirmed the findings and sentence as modified and approved by the substitute convening authority (Pet. App. 9a-11a). On petition of the accused, the United States Court of Military Appeals granted review limited to one issue specified by the court.[2] As to that issue, the court concluded that, in order to conform the pleadings to the proof, the three specifications of conspiracy to commit robbery should be consolidated into one specification, but that the consolidation could be effected without prejudice to petitioner's substantial rights (Pet. App. 2a-3a). Accordingly, the court affirmed the decision of the Court of Military Review (*id.* at 7a).

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[1]Although not absolutely required by military law (see *United States* v. *Andreas*, 14 M.J. 483, 486-487 (C.M.A. 1983)), a substitute convening authority was assigned to review this case because the original convening authority had granted immunity to a government witness.

[2]The court specified the following issue for review (19 M.J. 270 (C.M.A. 1985)):

> Whether the military judge erred to the accused's prejudice in denying a defense motion to treat the three conspiracy specifications as one.

1. The evidence showed that on the evening of June 15, 1982, petitioner conspired with a fellow Marine to commit several robberies on base. On that evening, the two men robbed two other Marines at gun point. Shortly thereafter, during the early morning hours of June 16th, the two conspirators attempted to rob a third Marine. Tr. 121-123.

After his trial and conviction, petitioner assigned six errors for consideration by the United States Navy-Marine Corps Court of Military Review. The Court of Military Review affirmed the findings and sentence below in a per curiam opinion (Pet. App. 11a):

> After a well litigated trial [petitioner] has assigned six errors. Under the [f]actual situation presented and decided at trial none of those has merit. The findings and sentence approved on review below are correct in law and fact and no error materially prejudicial to the substantial rights of [petitioner] was committed. Accordingly, the findings and sentence as approved on review below are affirmed.

2. Petitioner sought further review before the United States Court of Military Appeals. In his petition for review, he raised four issues: two contentions relating to the denial of his motions to suppress certain evidence and two claims alleging that the Court of Military Review had denied him due process of law and effective assistance of counsel by failing to explain the basis for its per curiam decision affirming his conviction. Exercising its discretion under Article 67(b)(3), UCMJ, 10 U.S.C. 867(b)(3), the Court of Military Appeals granted review limited to one issue specified by the court. See note 2, *supra*. The court's order affirming the decision of the Court of Military Review discussed only the specified issue and did not address any of the four issues on which petitioner had unsuccessfully sought review (Pet. App. 1a-7a).

ARGUMENT

Without citation of any authority, petitioner seeks a rule compelling military appellate courts to issue opinions fully articulating the reasons underlying their disposition of each error assigned or issue presented on appeal. Neither the Constitution nor the statute establishing those courts imposes any such requirement. Moreover, the rule petitioner seeks would impose a totally unnecessary burden on military tribunals and would contravene the well-settled practice of the civilian courts of appeals. Finally, petitioner's contention that the Court of Military Appeals must accept every issue presented to it on petition for review ignores express statutory language to the contrary and the clear intent of Congress. Accordingly, review by this Court is not warranted.

1. a. This Court has recognized that even in criminal cases "[t]here is * * * no constitutional right to an appeal." *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983). See also *Abney* v. *United States*, 431 U.S. 651, 656 (1977); *United States* v. *MacCollom*, 426 U.S. 317, 323 (1976) (plurality opinion). Thus, the existence and parameters of that right must be measured solely by the terms of the statutes and rules establishing the appellate process. See *Griffin* v. *Illinois*, 351 U.S. 12, 21 (1956) (Frankfurter, J., concurring); *McKane* v. *Durston*, 153 U.S. 684, 687-688 (1894). Where neither civilian nor military law governing criminal appeals requires an appellate court to address expressly and specifically each issue raised by the defendant, the Constitution, *a fortiori*, does not prescribe such a rule.

b. Contrary to petitioner's contention (Pet. 29), nothing in the language or purpose of the UCMJ requires military appellate courts to issue written opinions of any specified length or detail. In establishing the current system of appellate review of court-martial convictions, Congress sought to

insulate the appellate process from undue influence by military commanders while at the same time providing a uniform system that would not impede good order and discipline within the Armed Forces.[3] To accomplish these goals, Congress created a two-tiered review process. At the first level, review by a Court of Military Review is mandatory whenever, inter alia, the sentence extends to death, dishonorable or bad-conduct discharge, or confinement for more than one year. Art. 66(b)(1), UCMJ, 10 U.S.C. (Supp. II) 866(b)(1). The court must review the entire record and may affirm only those findings of guilt and sentences "as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ, 10 U.S.C. 866(c). The second tier in the military appellate system is the United States Court of Military Appeals. Review by that three-member civilian court is mandatory when the sentence extends to death or when the Judge Advocate General orders a case sent for review; in all other cases, the court has discretion to grant review "upon petition of the accused and on good cause shown." Art. 67(b)(3), UCMJ, 10 U.S.C. 867(b)(3). Thus, while carefully specifying the types of cases in which appellate review would be available, Congress in no way dictated the manner in which military courts must dispose of the cases that come before them.

c. In any event, requiring an appellate court to write a full opinion in every case would serve no useful purpose and would squander scarce judicial resources. Given the large

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[3]See S. Rep. 486, 81st Cong., 1st Sess. 6, 28-29 (1949); H.R. Rep. 491, 81st Cong., 1st Sess. 6-7, 31-32 (1949); *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 608-612, 623-624 (1949); *Uniform Code of Military Justice: Hearings on S. 857 & H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services*, 81st Cong., 1st Sess. 36, 42-43, 49, 91-92 (1949).

number of cases that come before the Courts of Military Review,[4] it simply is not possible to write lengthy opinions discussing each and every issue presented in every appeal. Appellate courts "should have wide latitude in their decisions of whether or how to write opinions." *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972). Further, "[t]he fact that a disposition is by informal summary order rather than by formal published opinion in no way indicates that less than adequate consideration has been given to the claims raised in the appeal." *Furman* v. *United States*, 720 F.2d 263, 265 (2d Cir. 1983). See also *NLRB* v. *Amalgamated Clothing Workers, Local 990*, 430 F.2d 966, 971 (5th Cir. 1970); *United States* v. *Pooler*, 13 M.J. 786, 789 (A.C.M.R.), petition denied, 14 M.J. 237 (C.M.A. 1982).

In the instant case, there is no reason to believe that the Court of Military Review failed to consider all six issues presented by petitioner. In fact, the court specifically stated (Pet. App. 11a) that it had considered the assigned errors and found them to be without merit. Petitioner, who has been represented by counsel at every step of this litigation, thus received adequate assurance that the Court of Military Review had examined the entire record and all of the issues raised on his behalf. Nothing further is required.

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[4]For the fiscal year ending September 30, 1984, the Navy-Marine Corps Court of Military Review reviewed 5,267 cases. *Annual Report of the Judge Advocate General of the Navy for Fiscal Year 1984*, 20 M.J. at CXLVII, CLVI (1985). See also *id.* at CXLV, CLXVII, CLXXIII (cases reviewed by Army, Air Force, and Coast Guard Courts of Military Review).

The same need to conserve judicial resources applies with equal force to the Court of Military Appeals. During fiscal year 1984, that court received 3,296 total filings (including 3,226 petitions for review) and resolved 4,038 matters (including 3,528 petitions). In completing its work, the court issued 90 signed opinions, 21 per curiam opinions, and 3,927 memoranda or orders. *Report of the United States Court of Military Appeals*, 20 M.J. at CXXI, CXXXI-CXXXIII (1985).

d. Finally, the issuance of a per curiam summary affirmance by the Court of Military Review accords with long-standing civilian appellate practice. All of the United States Courts of Appeals issue per curiam orders and summary dispositions to resolve significant numbers of civil and criminal appeals. This practice is authorized by the Federal Rules of Appellate Procedure and the circuits' local rules issued pursuant thereto, which allow, and in some cases encourage, the use of unpublished summary dispositions.[5] Aside from his bald assertion that a decision issued without a written opinion is a "facade" (Pet. 2), petitioner advances no tenable reason to justify his proposal to strip military appellate courts of the discretion to handle their caseloads in the same manner as the civilian courts of appeals.

2. In the second question he presents for review (Pet. i), petitioner argues that the Court of Military Appeals erred in granting review limited to one issue specified by the court (see note 2, *supra*) and in determining not to consider the four issues presented by petitioner. However, in cases reviewed "upon petition of the accused," Congress invested the Court of Military Appeals with discretion to determine which, if any, issues to consider. Art. 67(b)(3), UCMJ, 10 U.S.C. 867(b)(3). The legislative history of the UCMJ confirms Congress's intention to afford the Court of Military Appeals substantial latitude in determining which issues to consider on grant of review.[6] See also *United States* v.

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[5]See, *e.g.*, Fed. R. App. P. 47; Fed. Cir. R. 18(a); D.C. Cir. R. 13(c), 17(g); 1st Cir. R. 12, 14, App. I(B)(a); 2d Cir. R. § 0.23; 4th Cir. R. 18; 5th Cir. R. 47.5, 47.6; 6th Cir. R. 24; 7th Cir. R. 35; 8th Cir. R. App. (Plan for Publication of Opinions); 9th Cir. R. 21; 10th Cir. R. 17; 11th Cir. R. 25; Temp. Emer. Ct. App. R. 29(b).

[6]*Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services*, 81st Cong., 1st Sess. 45 (1949) (cases reviewed on petition of the accused are "like a petition for certiorari, if the accused can show good cause why it should be reviewed for questions of law"); *id.* at 52, 54, 116; H.R. Rep.

Kelly, 14 M.J. 196, 200 (C.M.A. 1982) (emphasis in original) ("action *may* be taken by our Court with respect to * * * those [issues] raised by an accused seeking review under Article 67(b)(3)"). Thus, the Court of Military Appeals acted well within its statutory discretion when it declined to grant review on the issues tendered by petitioner.[7]

491, 81st Cong., 1st Sess. 7, 32 (1949); S. Rep. 486, 81st Cong., 1st Sess. 29 (1949).

[7]Nothing in the Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 *et seq.*, altered the discretion of the Court of Military Appeals to determine which, if any, issues presented by an accused it should consider. The primary purpose of Section 10(a)(1) of the Act, 28 U.S.C. (Supp. I) 1259, which gave this Court certiorari jurisdiction over certain classes of cases decided by the Court of Military Appeals, was to provide a less cumbersome means for seeking discretionary review by this Court than had previously been available when the Court's jurisdiction was limited to collateral review in habeas corpus proceedings. See, *e.g.*, S. Rep. 98-53, 98th Cong., 1st Sess. 9, 32-34 (1983). At the same time, however, Congress made it clear that the Court of Military Appeals was to remain "the primary interpreter of military law" (*id.* at 10) and that it expected this Court to review only a very small number of cases (*ibid.*). Finally, Congress amended Article 67 of the UCMJ, 10 U.S.C. (& Supp. II) 867, in certain minor respects, but it made no change whatever in the discretionary jurisdiction of the Court of Military Appeals under Article 67(b)(3), 10 U.S.C. 867(b)(3).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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